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Introduction

War is often assumed to be a space devoid of a regulatory framing—characterized as inherently contrary to and separate from the input of social and ethical values expressed in laws—but international humanitarian law (IHL) contradicts this mistaken assumption. A field as fluid as the conflicts it addresses, IHL has developed into a highly-regimented, value-driven framework that increasingly affects and constrains state behavior.[1] Regulatory codifications of IHL are necessarily backwards-looking, arising in response to technological, political, and social developments that continuously change the nature of armed conflict.[2] Despite this continual evolution, the oppression of women has been thematically constant over sixteen centuries of IHL evolution, an unfortunately consistent value that has far-reaching impacts for the field.[3]

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1. *See* David Wippman, *The Nine Lives of Article 2(4)*, 16 MINN. J. INT'L. L. 387, 390 (2007) ("[T]he notion that Article 2(4) [of the UN Charter, which prohibits nations from using force without Security Council authorization] died . . . suggests a linear view of the effect of violations. Under this view, the norm ultimately collapses under the accumulated weight of too many and too significant breaches. This approach assumes that legal norms operate on a one-way ratchet, in which violations progressively undermine a norm with no room for recovery in between violations. In fact, Article 2(4) has displayed remarkable resilience; it not only stubbornly refuses to die, but sometimes emerges stronger than before."). *But see* Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 809 (1970) (asserting that Article 2(4) failed primarily because state practice showed the frequency of breach surpassed that of adherence).

2. *See* Jean d'Aspremont, *Decolonization and the International Law of Succession: Between Regime Exhaustion and Paradigmatic Inconclusiveness*, 12 CHINESE J. INT'L. L. 321, 322 (2013).

3. *See* Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 71 (1993) (arguing that the continued oppression,

The foundational doctrines of IHL evidence the marginalization of women in various ways. Notably, the doctrines repeatedly use essentialized conceptualizations of women as weak, infantile persons requiring protection from physical violence above all else to justify oppressive codifications. Ostensibly progressive IHL codifications rest on theoretical underpinnings that modernize historic inequality and perpetuate IHL's androcentric condition.

This Article unearths and analyzes the patriarchal roots of IHL and its essentialized conceptualizations of women with a gender-focused examination of the *Summa Theologica*, the Lieber Code, the Hague Conventions, and the Geneva Conventions. These foundational IHL texts contain recurring themes that marginalize, sexualize, and infantilize women under the guise of protection. The texts are fora in which the objectification and marginalization of women in conflict are surreptitiously endorsed and legitimized. Understanding the history and forms of female oppression is a critical first step toward ensuring the future of IHL does not perpetuate the shortcomings of the past.

I. Just War Theory

The seeds of IHL were sown in the late fourth and early fifth centuries by the theological doctrine of *justum bellum*.[4] Developed by Augustine of Hippo, *justum bellum* was an explanation of how and why armed conflicts should be fought, one of the earliest iterations of what would come to be known as just war theory.[5] In the thirteenth century, this body of thought became the doctrinal basis underpinning Thomas Aquinas's *Summa Theologica*.[6] This landmark text divided *justum bellum* into *jus ad bellum* ("right to war"[7]) and *jus in bello* ("law in waging war"[8]).[9] Together, *jus ad*

discrimination, and sexual violence perpetrated against women in conflict is a worldwide phenomenon and constitutes a "rare area [of international law] where there is genuinely consistent and uniform state practice").

4. *See* Robert D. Sloane, *The Costs of Conflation: Preserving the Dualism of* Jus ad Bellum *and* Jus in Bello *in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 57 (2009) (naming Augustine as "the progenitor of theological just war doctrine"); James O'Donnell, *Saint Augustine: Christian Bishop and Theologian*, ENCYCLOPEDIA BRITANNICA (June 24, 2016), https://www.britannica.com/biography/Saint-Augustine (reporting that Augustine of Hippo lived from 354 A.D. to 430 A.D.).

5. Sloane, *supra* note 4, at 57.

6. *See id.* at 58.

7. *Jus Ad Bellum*, BLACK'S LAW DICTIONARY (10th ed. 2014).

8. *Jus in Bello*, BLACK'S LAW DICTIONARY (10th ed. 2014).

9. *Compare* THOMAS AQUINAS, 2 SUMMA THEOLOGICA pt. II-II, question 40,

bellum and *jus in bello* constitute just war theory, the philosophical underpinning of modern IHL codifications that use the principles of proper authority, just cause, and rightful intention to define legitimate wars.[10] This formulation of just war theory, which encompassed the patriarchal and theological values of the era, formed the basis for modern Western understandings of wartime morality, highlighting its continued importance.[11]

As an abstract doctrine, Aquinas's just war theory differs from its successor texts in that it does not contain an essentialized view of women in conflict. Instead, the doctrine excludes women by its very structure, an absence that foreshadows later conceptualizations of women as objects, rather than actors, in war. Female absence is evident in each of the fundamental principles of just war theory. First, Aquinas's principle of proper authority restricts the ability to initiate armed conflict to sovereign states.[12] In Aquinas's world, men alone controlled the state while women were passive subjects of the law. By harnessing the right to initiate armed conflict to the men who held state power, the principle of proper authority reflected the prevailing roles of men as actors and women as objects.[13]

The just war tradition is further masculinized by the second principle—just cause—which envisions self-defense of the state as

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art. 1, at 1359–60 (Benziger Brothers, Inc. 1947) (discussing the "authority of the sovereign" and "just cause," both components of *jus ad bellum*)), *with id.* at 1360 (explaining that "belligerents should have a rightful intention" and stating that "[m]anly exercises in warlike feats of arms are not all forbidden, but those which are inordinate and perilous, and end in slaying or plundering" are forbidden). *But see* Sloane, *supra* note 4, at 58 ("Aquinas . . . did not develop a distinct *jus in bello*. Although he condemned the deliberate slaughter of noncombatants, this and other scattered theological antecedents did not add up to a coherent conception of *jus in bello* as a set of legal or ethical injunctions.").

10. *See* Mark E. DeForrest, *Just War Theory and the Recent U.S. Strikes Against Iraq*, 1 GONZ. J. INT'L L. § B.1 (1997–98), https://www.law.gonzaga.edu/gjil/2006/03/just-war-theory-and-the-recent-us-strikes-against-iraq/ (citing St. Augustine, who said that war can only be justified by a desire for peace and must be waged under lawful authority).

11. *See* MICHAEL WALZER, JUST AND UNJUST WARS 21 (4th ed. 2006) (discussing the continued use of the concepts of *jus ad bellum* and *jus in bello* to assess the morality of war).

12. AQUINAS, *supra* note 9, at 1359 ("In order for a war to be just, three things are necessary. First, the authority of the sovereign by whose command the war is to be waged . . . . [I]t is not the business of a private individual to declare war.").

13. *Cf.* Judith Gardam, *Gender and Non-Combatant Immunity*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 345, 356 (1993) (arguing that the tenets of just war theory concerning non-combatants, while often "regarded as based on principles of humanity, in reality . . . serve[] the purposes of the patriarchal State" and are derived from "the canonical doctrine which primarily protected the Church's own to the exclusion of women").

the only moral justification for armed conflict.[14] By predicating the validity of armed conflict on the defense of the patriarchal state, just cause marks wartime morality as a thoroughly masculine-defined space. In this way, just cause, indirectly but unavoidably, focuses on the male perspective and precludes the consideration of female experiences, prioritizing the protection of masculine entities above all else.

Unlike proper authority and just cause, which focus on *jus ad bellum*, Aquinas' third principle—right intention—speaks to *jus in bello*.[15] Right intention requires the state's reason for initiating armed conflict to be pure and articulated in moral terms.[16] Aquinas's definition of "morality" echoes the theology and values of the medieval Catholic Church.[17] Right intention fills the moral void of the battlefield with the masculine values of Christian theology in a way which either "legitimates killing or . . . condemns violence without attending to the despair and abuse from which it arises."[18] This patriarchal institution joins the masculine state institutions shaping *jus ad bellum* to round out the thoroughly-gendered paradigm of just war theory.[19]

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14. *See* AQUINAS, *supra* note 9, at 1360 ("Secondly, a just cause is required, namely that those who are attacked, should be attacked because they deserve it on account of some fault.").

15. *See id.* (condemning as contrary to "rightful intention" "[t]he passion for inflicting harm, the cruel thirst for vengeance, an unpacific and relentless spirit, the fever of revolt, the lust of power, and such like things"); *cf.* GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 7 (2010) (stating that actions in war are "limited to the means considered 'necessary'" and that "indiscriminate violence suggests violence as an end in itself, and that is antithetical to the fact that war is a goal-oriented activity").

16. AQUINAS, *supra* note 9, at 1360 ("Thirdly, it is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil. Hence Augustine says . . . 'True religion looks upon as peaceful those wars that are waged not for motives of aggrandizement, or cruelty, but with the object of securing peace, of punishing evil-doers, and of uplifting the good . . . . The passion for inflicting harm, the cruel thirst for vengeance, an unpacific and relentless spirit, the fever of revolt, the lust of power, and such like things, all these are rightly condemned in war.'").

17. *See* Sloane, *supra* note 4, at 58–59 (discussing the influence of Catholic theology on the creation of the just war doctrine).

18. SARA RUDDICK, MATERNAL THINKING: TOWARD A POLITICS OF PEACE 135 (1989); *see also* Sloane, *supra* note 4, at 58 ("In general, in the theological, as in the Roman, tradition, a just cause authorized any means of war, however brutal.").

19. *Cf.* Jean Bethke Elshtain, *Reflections on War and Political Discourse: Realism, Just War, and Feminism in a Nuclear Age*, *in* JUST WAR THEORY 260, 263–64 (Jean Bethke Elshtain ed., 1992) (tracking a Hobbesian feminist legal theory and arguing that, "[i]f women are to gain 'first-class citizenship' they, too, must have the right to fight").

Just war theory positions masculinity and Christian morality to dominate the sphere of armed conflict.[20] Unlike later codifications that specifically address women, just war theory is devoid of any references to either women or men. When the principles are understood in the context of their inextricable connection to patriarchal social institutions—wherein the ability to be an actor in conflict was predicated on gaining access to exclusively male institutions—this facial gender neutrality evidences not equality, but the total omission of women's experiences in conflict. The just war tradition takes on the androcentric hue of the greater social machinery by defining itself with reference to exclusive institutions. This indirect yet powerful manifestation of masculine privilege demonstrates a phenomenon that continues into the modern day in which oppression is made invisible by ostensibly gender-neutral values which appear, at first glance, to be legitimate and moral. Not for the last time in the history of IHL, just war theory articulates a gendered dynamic wherein *de jure* equality results in the *de facto* privileging of men.

Furthermore, just war theory's implicit denial of female agency set the stage for later IHL doctrines. Out of this philosophical cloud emerge doctrines that perceive women as needing to be protected above all else, a perspective that perpetuates oppression and marginalization in the guise of "protection." The privilege bestowed upon men by just war theory and the marginalization suffered by women have enduring results; these asymmetries are the roots of the current normative framework of IHL.

II. The Lieber Code

In the six centuries following the publication of *Summa Theologica*, the rule of law made significant headway on the battlefield. By the late nineteenth century, philosophical principles and customary laws of armed conflict had coalesced into general rules refined by the establishment of various national battlefield codes.[21] The Lieber Code was among the first and most influential of these domestic codifications.[22] Drafted by Franz

20. *See* JEAN BETHKE ELSHTAIN, WOMEN AND WAR 91 (1987) (explaining that one of the ways that the feminine imagination is limited is by precluding the search for pacifist resolutions).

21. SOLIS, *supra* note 15, at 7.

22. Theodor Meron, *Francis Lieber's Code and Principles of Humanity*, 36 COLUM. J. TRANSNAT'L L. 269, 278 (1998) ("Both the Code's high quality and its timing, written when no other significant compilations of laws and customs of war

Lieber in 1863, the Code was approved by President Abraham Lincoln to regulate the conduct of Union forces during the U.S. Civil War.[23]

As the first substantial codification of the customary laws of armed conflict, the Lieber Code served as a guide for subsequent domestic and international codifications, affording it significant influence in the development of IHL.[24] Accordingly, the Lieber Code's provisions on the protection of women in conflict set the stage for the next century of IHL's conceptions of women.[25] Departing from just war theory's gender silence, the Lieber Code—an innovative document reflecting the era's changing views on femininity—provided unprecedented protections to civilians, in general, and women, in particular.[26] Notably, Articles 19, 37, and 44 speak directly about women.[27]

The welcome inclusion of women obscures the Lieber Code's problematic focus on protecting female bodies. The Lieber Code understands the feminine legal personality to exist exclusively in dialogue with women's physical integrity, as women's bodies were understood to be male property.[28] At the time of the Lieber Code, rape was "associated with crimes of property rather than crimes against the person"[29] and understood primarily as a violation of masculine honor rather than the woman's body.[30] Under this view, women did not have independent legal personality but derived protection from men who had full legal capacity.[31] Article

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were available, can explain its tremendous impact on the codification of international humanitarian law.").

23. *See* George D. Haimbaugh, Jr., *Introduction to Panel II: Humanitarian Law: The Lincoln-Lieber Initiative*, 13 GA. J. INT'L & COMP. L. 245, 245–46 (1983).

24. Diane Marie Amann, *Punish or Surveil*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 873, 879 (2007) ("Later codifications of U.S. military law, among them the Articles of War, applied during the two World Wars, built upon the foundation established by the Lieber Code. That code likewise formed a cornerstone of international humanitarian law, including the Geneva Conventions of 1949.").

25. *See* Meron, *supra* note 22, at 275.

26. Patricia Viseur Sellers, *The Cultural Value of Sexual Violence*, 93 AM. SOC'Y INT'L L. PROC. 312, 317 (1999) ("The Lieber Code illustrates states' changing view of persons within civil society in general and women in particular, and the effects that wartime sexual violence has on citizens.").

27. FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD 8–9, 14, 16 (Washington, Government Printing Office 1898).

28. David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of* Jus Cogens*: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 236 n.59 (2005).

29. *Id.*

30. *Id.*

31. *See id.*

37 reflects this perspective by linking a woman's right to be free from sexual violence to the need to protect the "sacredness of domestic relations," saying nothing about the impact of rape on the woman herself.[32]

Article 44 serves a more utilitarian function in prohibiting rape, providing that "[a]ll wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited . . . ."[33] Article 44 states that a disobedient soldier committing rape may be executed on the spot.[34] Rape is viewed as a threat to troop discipline and, by extension, to the larger patriarchal military that depends on an orderly chain of command.[35] In this context women are protected primarily for the needs of men, an implicit prioritization of the integrity of the masculinized military machinery over the integrity of women.[36] Though Article 37 and Article 44 demonstrate different motivations for prohibiting rape—masculine honor and military discipline, respectively—both locate the primary harms of rape on a masculine entity rather than with the woman herself. Moreover, while these prohibitions provided protection for the physical integrity of women, they ignored the need to address the social, economic, and political harms women faced as a consequence of military conflict. This narrow scope implies that the only harm a woman may face in conflict that merits consideration is a violation of her physical integrity and only insofar as such harm impacts masculine entities.

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32. LIEBER, *supra* note 27, at 14 ("The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations.").

33. *Id.* at 16.

34. *Id.*

35. Crystal N. Feimster, *Rape and Justice in the Civil War*, N.Y. TIMES (Apr. 25, 2013), http://opinionator.blogs.nytimes.com/2013/04/25/rape-and-justice-in-the-civil-war/ ("Together the articles conceived and defined rape in women-specific terms as a crime against property, as a crime of troop discipline, and as a crime against family honor. Most significantly, the articles codified the precepts of modern war on the protection of women against rape that set the stage for a century of humanitarian and international law.").

36. *Cf.* Mark Visger, *Civilian Court-Martial Jurisdiction and* United States v. Ali*: A Re-examination of the Historical Practice*, 46 TEX. TECH L. REV. 1111, 1132 (2014) (asserting that rape has "an acute impact on morale, discipline, [and] mission-accomplishment within the theater" of armed conflict).

Article 19 of the Lieber Code addresses women outside the context of sexual violence by requiring that "[c]ommanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences."[37] Though the protective intent of the Article seems benign, coupling women with children implicitly diminishes women's roles as capable participants in conflict. Similarly, categorically designating women as noncombatants perpetuates the gendered bifurcation between combatants and noncombatants: men are soldiers and women are civilians.[38] As just war theory gendered the normative architecture of IHL, the Lieber Code gendered its participants.

Moreover, while Articles 19, 37, and 44 mark a certain degree of progress toward acknowledging women in conflict, their impact was limited by the practical realities of 1860s American society. When the Code was promulgated in 1863, women were disenfranchised and enjoyed limited legal rights.[39] These pervasive barriers to legal access were augmented by the socially and sexually conservative culture which exalted women's "virtue."[40] This social pressure made it difficult for women to come forward and dramatically reduced the relevance of these codifications for the many women who experienced sexual violence during the Civil War.[41] In total, the Union military tribunals prosecuted only around 250 cases involving rape, though possibly thousands were the victims of rape and reports of rape were widespread.[42]

The Lieber Code's early effort to prohibit rape in conflict illustrates the large chasm between a right existing in the law and the right being accessible through the hardships of gender inequality, an echo of the theoretical and pragmatic disconnect of just war theory. The Lieber Code offered some limited protection for women under the law, but did so at the heavy price of

37. LIEBER, *supra* note 27, at 8–9.

38. *See* Gardam, *supra* note 13, at 348.

39. Sellers, *supra* note 26, at 317 ("The code's language is important, notwithstanding that in 1863, when the Lieber Code was issued, U.S. society did not grant citizenship to Native Americans or slaves, and women of European descent who did hold citizenship exercised only limited property rights and were universally disenfranchised.").

40. CRYSTAL N. FEIMSTER, SOUTHERN HORRORS: WOMEN AND THE POLITICS OF RAPE AND LYNCHING 20 (2009).

41. *Id.*

42. *Id.* at 20–21.

endorsing the view of women as objects with no capacity to make meaningful contributions and with no independent right to protection from physical harm.

III. The 1899 and 1907 Hague Conventions

As the Industrial Revolution ushered in an era of progressive idealism, it inspired a peace movement with hopes that Europe would move away from the use of force to resolve international disputes.[43] Out of these aspirations came the 1899 and 1907 Hague Conventions, the first comprehensive codifications regulating warfare with a focus on humanitarian principles.[44] The binding international character of these texts also marked the shift from *rules* of warfare to *laws* of warfare.[45] As the Conventions recast previous IHL principles as binding obligations,[46] however, they remained colored by patriarchal values, bringing the androcentric focus of Aquinas and Lieber into the modern law of armed conflict.

Though the Hague Conventions incorporate much of the Lieber Code's text, Lieber's explicit references to sexual harms suffered by women in conflict are noticeably absent.[47] The failure to codify clear prohibitions on sexual violence stems from Western discomfort with women's sexuality during this era.[48] The closest the Conventions come to addressing sexual violence is a euphemistic reference in Article 46.[49] The Article provides that "[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected."[50] "Family honour and rights" is understood as a

43. SOLIS, *supra* note 15, at 51 (2010) ("In the nineteenth century, the European world, along with the United States, developed a confidence in modern progress that extended to a hope that the abolition of war was possible.").

44. MARIA ERIKSSON, DEFINING RAPE: EMERGING OBLIGATIONS FOR STATES UNDER INTERNATIONAL LAW? 345 (2011) ("The 1899 and 1907 Hague Conventions were the first to embody comprehensive normative principles regulating warfare on the basis of humanity.").

45. *See* SOLIS, *supra* note 15, at 57–58.

46. *Id.* at 56.

47. TUBA INAL, LOOTING AND RAPE IN WARTIME: LAW AND CHANGE IN INTERNATIONAL RELATIONS 63 (2013).

48. *See id.* at 65 ("One possibility is that the Europeans of the nineteenth century—with their emphasis on decency, finesse, manners, and propriety—did not want to spell out the word *rape*, particularly in a diplomatic document. From the mid-eighteenth century onward, as a result the rise of the idea of delicacy, or prudery, sexuality in any form offended and embarrassed people . . . .").

49. *Id.*

50. Convention Respecting the Laws and Customs of War on Land annex art. 46, Oct. 18, 1907, 36 Stat. 227 [hereinafter Hague Convention IV]; Convention with

reference to sexual violence,[51] but unlike other articles which declare actions "prohibited" or "forbidden," Article 46 only demands "respect" of family honor.[52]

By contrast, Article 23 "especially forbid[s]" eight different crimes.[53] From a prohibition on the use of poisoned weapons to wounding of an enemy attempting to surrender, the enumerated crimes focus exclusively on harms that may befall active participants in conflict,[54] a realm inaccessible to women in the late nineteenth and early twentieth centuries. These "especially forbidden" crimes derive from the hyper-masculine chivalric tradition, the resurrection of which underlines the point that conflict remains an entirely masculine space.[55] The hierarchy of harms created by Article 23 juxtaposed against the weak language found in Article 46 demonstrates the deprioritization of women's experiences in conflict and greater subordination to hegemonic masculinity in IHL codifications.[56] Moreover, given the clear difference between the strong prohibitions in Article 23 and the watered-down language of Article 46, Article 46 is problematic in at least four respects. First, it casts rape as a moral offense akin

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Respect to the Laws and Customs of War on Land annex art. 46, July 29, 1899, 32 Stat. 1803 [hereinafter Hague Convention II].

51. Patricia Viseur Sellers, *The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law*, *in* 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS 263, 275 n.64 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000) ("That 'family honor' meant forms of sexual violence was only too apparent. The Commission of Government Experts' Study of Conventions for the Protection of War Victims . . . urged, in light of the rapes, indecent assaults and placement of women in disorderly houses, and the proscribed recognition of 'family honor' in Article 46 of . . . Hague Convention IV, that a more precise definition respecting the decency and dignity of women be proclaimed in the new Conventions.").

52. For example, the very next article, Article 47, states clearly "[p]illage is formally forbidden." Hague Convention IV, *supra* note 50, at annex art. 7.

53. Hague Convention IV, *supra* note 50, annex art. 23; Hague Convention II, *supra* note 50, annex art. 23.

54. Hague Convention IV, *supra* note 50, annex art. 23.

55. See LÉON GAUTIER, CHIVALRY (London, George Routledge and Sons, Ltd., Henry Frith trans. 1891) (discussing the chivalric code with respect to acts of treachery and surrender, the provision of quarter, and the formalities of a truce), published fifteen years before the Hague Convention II, *supra* note 50, art. 23 (prohibiting treachery, the killing of a surrendered individual, the refusal of quarter, and the improper use of a flag of truce).

56. The overt masculinity of the Hague Conventions is also textually evident. All gendered pronouns are masculine, demonstrating that women's presence on the battlefield was inconceivable at the time of the Conventions. *See, e.g.*, Hague Convention II, *supra* note 50, annex art. 9 ("Every prisoner of war, if questioned, is bound to declare his true name and rank, and if he disregards this rule, he is liable to a curtailment of the advantages accorded to the prisoners of war of his class.").

to property offenses instead of a crime of violence, a demotion on the perceived hierarchy of harms occurring in conflict.[57] Second, the framing of Article 46 directs focus to the victim and the victim's family honor rather than the perpetrator's violence, weakening accountability for both the perpetrator and the state.[58] Third, by identifying sexual violence as the primary harm that women will face in conflict, the Hague Conventions perpetuate the problematic idea that the harms faced by men and women in conflict are mutually exclusive, marginalizing men who experience sexual violence.[59] Finally, the Conventions continue to imply that sexual violence against women only merits redress when it impacts men's interests. In an era where women continued to be considered property of men, Article 46 was designed "to facilitate pacification of the subjugated population during occupation," i.e. prevent men from becoming upset at the rape of "their" women.[60] In both the goal and implementation, Article 46 exemplifies how women's experiences are distinguished from those of men, yet women are recognized primarily for the effect they have on men.

Though Article 46 is the most overt reference to sexual violence in the Conventions, many believe a prohibition on rape can also be read into Article 1.[61] The text of Article 1 provides that "[t]he Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land . . . ."[62] While "the laws and customs of war" at the time of these Conventions did include a general prohibition on rape and sexual violence,[63] their

57. In contrast, the language describing violent crimes such as using prohibited weapons or killing outside of a military campaign is much stronger and clearly demonstrates the priorities of the drafters of the Convention. *Compare* Hague Convention IV, *supra* note 50, at sec. III, ch. III art. 46 ("Family honour and rights, the lives of person, and private property, as well as religious convictions and practices, must be respected."), *with id.* at sec. II, ch. I, art. 23 ("[I]t is especially forbidden: (a.) To employ poison or poisoned weapons; (b.) To kill or wound treacherously individuals belonging to the hostile nation or army; (c.) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion . . . .")

58. *See* INAL, *supra* note 47, at 66 (arguing that the primary reason state parties to the Convention preferred vague language was that states did not wish to bind themselves with clearer, specific language prohibiting rape).

59. For example, while Article 46 or the customary laws of war in 1907 "could be interpreted to include prohibition of rape of prisoners of war . . . [that] interdiction was first explicitly incorporated into the Geneva Convention of 1929." Sellers, *supra* note 51, at 275 n.65.

60. *Id.*

61. *Id.*

62. Hague Convention IV, *supra* note 50, at art. 1.

63. *See* Sellers, *supra* note 51, at 274 (stating that rape was among the crimes

lack of specificity provides scant protection for women and, like Article 46, are only applicable in wartime.

Articles 1, 23, and 46 draw from and build upon the gendered foundation laid by just war theory and the Lieber Code.[64] While purporting to protect humanity, the Hague Conventions mistake masculinity for humanity.[65] The consideration of rape as a moral violation of honor, applicable only during occupation, reflects the prudery of the era and embeds the dissociation of femininity and armed conflict into modern IHL.[66] Read together, the Lieber Code and the Hague Conventions evidence how a singular, essentialized view of women causes this dissociation: women are either mentioned in their sexual capacity,[67] they are discussed in a diminished capacity on par with children,[68] or they are mentioned only indirectly when their sexuality becomes uncomfortable.[69] In all these scenarios, women are restricted by societal views that only conceive of a woman in a sexual or reproductive capacity or as a diminished actor who lacks agency. The preceding doctrines of IHL make this oppression seem natural and ethical.[70] This essentialized view of women gives rise to efforts to "protect" these sexual, weak objects and continues female marginalization into the modern era.

IV. The 1949 Geneva Conventions

Throughout history, developments in IHL have been prompted by developments in warfare that exposed gaps in existing IHL codifications.[71] The 1949 Geneva Conventions arose in response to the widespread devastation and tactical targeting of civilians in World War II.[72] The drafters of the 1949 treaties revised the three existing Geneva Conventions and introduced the fourth (Geneva IV), a groundbreaking treaty dedicated exclusively

framers of the Hague Conventions intended to proscribe when they used the phrase "laws and customs of war").

64. *See* INAL, *supra* note 47, at 63.

65. *See* Hague Convention II, *supra* note 50, Preamble (stating that the parties to the Convention were "[a]nimated by the desire to serve . . . the interests of humanity").

66. *See* INAL, *supra* note 47, at 65; Sellers, *supra* note 51, at 275.

67. LIEBER, *supra* note 27, at 8–9 (Article 19), 14 (Article 37).

68. *Id.* at 16 (Article 44).

69. Hague Convention IV, *supra* note 50, at annex art. 46.

70. *See* discussion of Aquinas and just war theory, *supra* Section I.

71. Theodor Meron, *The Humanization of Humanitarian Law*, 64 AM. J. INT'L L. 239, 243 ("Calamitous events and atrocities have repeatedly driven the development of international humanitarian law.").

72. SOLIS, *supra* note 15, at 80.

to the protection of civilians in conflict.[73] The 1949 Conventions are the most-ratified treaties in the world and comprise the bulk of present-day IHL.[74] The changing roles of women in conflict and society are evidenced in thirty-four references to the unique experience of women in conflict, a welcome improvement from the silence of the Hague Conventions.[75]

Unfortunately, the Conventions continue to bifurcate civilian and combatant statuses along gendered lines, define the value of women by reproductive capacity, and reflect old tropes of chastity and purity. Article 88 of the Third Geneva Convention provides:

> Officers, non-commissioned officers and men who are prisoners of war undergoing a disciplinary or judicial punishment, shall not be subjected to more severe treatment than that applied in respect of the same punishment to members of the armed forces of the Detaining Power of equivalent rank.
>
> A woman prisoner of war shall not be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a woman member of the armed forces of the Detaining Power dealt with for a similar offence.
>
> In no cases may a woman prisoner of war be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a male member of the armed forces of the Detaining Power dealt with for a similar offense.[76]

Article 88 is one of the few articles that addresses women beyond their role as mothers and thus foresees conflicts in which women, in defiance of traditional gender roles, are active

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73. *Id.* at 83–84.

74. Philip Spoerri, Director of International Law, ICRC, Address at Ceremony to Celebrate the 60th Anniversary of the Geneva Conventions (Dec. 8, 2009) (transcript available at https://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-120809.htm) ("With the last few (7) ratifications since the year 2000 the application of the Geneva Convention has today become universal, with 194 States party.").

75. *See e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 arts. 3, 12, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 3, 12, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War arts. 3, 14, 16, 25, 29, 49, 88, 97, 108, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 3, 14, 16, 17, 21, 22, 23, 27, 38, 50, 76, 85, 91, 97, 98, 119, 124, 127, 132, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

76. Geneva Convention III, *supra* note 75, at art. 88.

participants.[77] While the express acknowledgement of women's unique situation on the battlefield is welcome, instances of this acknowledgement are few and far between.[78] Further, Article 88 separates the experience of female combatants—singling them out as an exception to the rule of male combatants—and thus reveals that the gender-neutral language that predominates the rest of the Geneva Conventions speaks to men alone.[79] Thus, while the inclusion of female combatants is a step toward viewing women outside the essentialized depictions of the Lieber Code and Hague Conventions, the paucity of these mentions and the gendered bifurcation of Article 88 elucidate the continued understanding of men as the sole capable actors in conflict.[80]

Though Article 88 provides limited female recognition in the hegemonic construct of combatancy, other articles perpetuate the shortcomings of previous IHL texts that accord women legitimacy solely in the context of their reproductive capacity.[81] Thus, many of the 1949 Conventions' references to women focus on pregnancy and maternity.[82] For example, Article 38 of Geneva III states that

77. *See, e.g.*, Geneva Convention III, *supra* note 75, at annex I, sec. I(B)(7) ("All women prisoners of war who are pregnant or mothers with infants and small children"; Geneva Convention IV, *supra* note 75, at art. 14 (stating that parties to the Convention "may establish . . . hospital and safety zones and localities so organized as to protect from the effects of war" among other persons "expectant mothers and mothers of children under seven").

78. For example, the fourth Geneva Convention has 159 articles and only 19 of them—Articles 3, 14, 16, 17, 21, 22, 23, 27, 38, 50, 76, 85, 91, 97, 98, 119, 124, 127, 132—or about 12%, mention women or females. Geneva Convention IV, *supra* note 75.

79. *See e.g.* Geneva Convention III, *supra* note 75, at art. 4 (defining "[p]risoners of war" as "persons belonging to one of the following categories, who have fallen into the power of the enemy: . .").

80. *See* BETHKE ELSHTAIN, *supra* note 20, at 40–42 (1987) (contending that dualistic gender discourse which casts men as warriors and women as "beautiful souls" who embody domesticity fails to reflect the reality and complexity of both women's and men's shifting roles in both peacetime and wartime).

81. Helen Durham & Katie O'Byrne, *The Dialogue of Difference: Gender Perspectives on International Humanitarian Law*, 92 INT'L REV. OF THE RED CROSS 31, 34 (2010) (explaining that IHL "often either relegates women to the status of victims, or accords them legitimacy only in their role as child-rearers").

82. *E.g.* Geneva Convention IV, *supra* note 75, art. 16 ("The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect."); *id.* at art. 38 ("Children under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned."); *id.* at art. 50 ("The Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years."); *id.* at art. 89 ("Expectant and nursing mothers and children under fifteen years of age shall be given additional food, in proportion to their physiological needs."); *id.* at

"[c]hildren under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned."[83] As in the Lieber Code, the 1949 Conventions refer to women and children in the same manner,[84] infantilizing women as passive and incapable persons. This presentation also denies the existence of men as civilians, furthering the artificially-gendered and—post-World War II—increasingly anachronistic dichotomy between civilians and combatants.[85] The Geneva Conventions acknowledge women's specific needs as mothers nearly to the exclusion of any acknowledgement of their needs qua women. In favoring women's reproductive lives over their independent identities, the Geneva Conventions reduce women to a singular identity and ignore the non-reproductive harms suffered by women.[86]

Further linking women's value with their bodies, Article 27 of Geneva IV provides that, "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[87] Article 27 revisits the "honor" crimes that originated in the Lieber Code and continued in the Hague Conventions, nesting sexual violence in terms intrinsically related to notions of chastity and purity and continuing to focus on female victimization via crimes of rape.[88] As in the Hague Conventions, Article 27 does not envision rape as

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art. 132 ("The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.").

83. Geneva Convention III, *supra* note 75, at art. 38.

84. *Compare* Geneva Convention IV, *supra* note 75, at art. 38 ("Children under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned."), *with* LIEBER, *supra* note 27, at 8–9 (requiring, in Article 19, that "[c]ommanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences").

85. *See* Françoise Krill, *The Protection of Women in International Humanitarian Law*, 249 INT'L REV. RED CROSS 337 (1985) (noting that "[i]n World War II, women participated in hostilities in greater numbers").

86. *See* Durham & O'Byrne, *supra* note 81, at 34.

87. Geneva Convention IV, *supra* note 75, art. 27.

88. *Compare id.* ("Women shall be especially protected against any attack on their honour . . . ."), *with* LIEBER, *supra* note 27 ("The United States acknowledge and protect . . . the persons of the inhabitants, especially those of women . . . ."), *and* Hague Convention IV ("Family honour and rights . . . must be respected.").

a violation on par with other crimes prohibited in Geneva IV that conceive of violations against personhood.[89] The language of "honor" again casts rape as a moral, rather than criminal, offense.[90] Recognizing rape primarily as a violation of women's value as "pure" sexual beings—rather than as a violation of her personhood—presents a skewed view of the world in which men are not raped and the worst harm a woman can suffer is a violation of her sexual purity.[91]

The Geneva Conventions display the compromised equality of the modern era. Provisions addressed specifically to women demonstrate that the conspicuously gender-neutral language elsewhere is in fact masculine.[92] These provisions grant protections to women on the premise of their inherently-greater vulnerability and are accompanied by provisions addressing only women's sexual and reproductive lives.[93] This knee-jerk protectionism presents two problematic echoes of earlier IHL texts. First, the focus on maternal or sexual harms marginalizes the roles women play outside of those capacities.[94] Second, the harms addressed in the Geneva Conventions are rooted in masculine dominion over the female body.[95] Women are protected because they bear children[96] and women are protected from "honour crimes,"[97] a return to the era where the female body belonged to men. The Geneva Conventions perpetuate a model that fails to see women as persons independently worth protecting.[98] In this way, seemingly protective measures serve to extend archaic and limited understandings of women and their bodies into the modern era under the auspices of protection and equality.[99] In the world of the Geneva Conventions, men fight to protect innocent and vulnerable women whose legal capacity

89. *See* Durham & O'Byrne, *supra* note 81, at 35.

90. *See supra* text accompanying note 57.

91. *See supra* text accompanying note 59; FEIMSTER, *supra* note 40, at 19–20.

92. *See supra* text accompanying notes 78–85.

93. *See supra* text accompanying note 86.

94. *Compare* Geneva Convention IV, *supra* note 75, at art. 38 (requiring "preferential treatment" for "pregnant women and mothers of children under seven years"), *with* Hague Convention IV, *supra* note 50 ("Family honour and rights . . . must be respected.")

95. *See* Geneva Convention IV, *supra* note 75, at art. 27 (focusing on protecting women's honor); *see also supra* text accompanying notes 39–41 (discussing the primacy of women's virtue in the mid-19th century).

96. *See* Geneva Convention IV, *supra* note 75, at art. 38.

97. *Id.* at art. 27.

98. *See* Durham & O'Byrne, *supra* note 81, 34–35.

99. *See id.*

continues to be predicated on a masculine conduit.[100] From this perspective, the subordination of women in IHL doesn't appear to be incidental, but deliberately constructed.

Conclusion

One must look no further than the Women, Peace and Security Agenda (WPSA) to see that, despite normative changes in IHL, the phenomenon of oppression though protection has continued into the present day. The WPSA was launched in 2000 and consists of seven interrelated Security Council resolutions that provide the most recent manifestation of "protection" which fails to meaningfully recognize the experiences of women in conflict and post-conflict settings.[101] The protection of women from conflict-related sexual violence is mentioned in each resolution comprising the WPSA.[102] Feminist scholars were quick to critique this essentialist focus, noting it depicts a woman's body as the only possible feminine site of violence while overlooking the plethora of other harms women may face in conflict.[103] This narrow focus on women's bodies as the primary site needing "protection" reduces women to a singular conflict experience and allows the WPSA to be more easily manipulated to legitimize androcentric conflicts.[104] Accordingly, in much the same way as the Geneva Conventions before it, the WPSA facilitates the objectification of women

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100. *See* ELSHTAIN, *supra* note 20, at 102–03.

101. S.C. Res. 1325 (Oct. 31, 2000); S.C. Res. 1820 (June 19, 2008); S.C. Res. 1888 (Sep. 30, 2009); S.C. Res. 1889 (Oct. 5, 2009); S.C. Res. 1960 (Dec. 16, 2010); S.C. Res. 2106 (June 24, 2013); S.C. Res. 2122 (Oct. 18, 2013); *see Women, Peace, and Security*, UNITED NATIONS PEACEKEEPING, http://www.un.org/en/peacekeeping/issues/women/wps.shtml (last visited Jan. 14, 2017).

102. For example, the term sexual violence appears more than thirty-six times in the five pages of Resolution 1960 and is the overwhelming focus of the resolution. By contrast, the resolution has one mention of gendered rule of law, one mention of reconstruction empowering women, two mentions of gendered security, and no mentions of women in disarmament, demobilization, and reintegration. *See* S.C. Res. 1960 (Dec. 16, 2010).

103. *See* Nicola Pratt & Sophie Richter-Devroe, *Critically Examining UNSCR 1325 on Women, Peace and Security,* 13 INT'L J. FEM. POL. 489, 490 (2011).

104. *See* Jessica Neuwirth, *Women and Peace and Security: The Implementation of U.N. Security Council Resolution 1325*, 9 DUKE J. GENDER L. & POL'Y 253, 254 (2002) (explaining how women's movements and progressive measures such as Security Council Resolution 1325 were co-opted to help build support for United States military actions in Afghanistan in the early 2000s); *see also* Jiri Krcek, *What's Wrong with Just War Theory? Examining the Gendered Bias of Longstanding Tradition*, 4 INQUIRIES JOURNAL no. 5 (2012), http://www.inquiriesjournal.com/articles/648/whats-wrong-with-just-war-theory-examining-the-gendered-bias-of-a-longstanding-tradition ("These gender stereotypes indicate that women's need for protection is the causality as well as the source of moral legitimacy to the practice of making war.").

without providing substantive protections for the myriad non-sexual harms arising in modern conflict.[105]

The danger of high-visibility mandates, like the WPSA, that fail to address root causes of inequality is the creation of a veneer of equality that placates the international community and decreases motivation to address the true problems. Analyses of the complex relationship between IHL and the social values underlying its codifications are noticeably absent from gender critiques of the WPSA, as well as critiques of the broader corpus of IHL. The marginalization of women in conflict is but a symptom of greater and longstanding social and cultural inequalities that IHL will not be able to overcome without a deep and critical awareness of its own history.

The foundational texts of IHL document a long history of female oppression. From just war theory's denial of women's capabilities in conflict emerges the compromised equality of the present day, wherein women are present in IHL texts but primarily as victims of sexual harm or infantilized persons needing protection above all else. Women's experiences in conflict have been deprioritized for centuries, generally only considered to the extent they impact male interest. To genuinely and holistically empower women in traditional and non-traditional conflict settings by way of international codifications, we must first make salient the normative roots of current equality. It is long past time for the development of a normative framework that is able to acknowledge the deep roots of gendered oppression in IHL and work to meaningfully repair the errors of the past.

105. *See* Pratt & Devroe, *supra* note 103, at 496–97.